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No. 91-753

In The

Supreme Court of the United States

October Term, 1991

JOHN M. ABICK, JAMES R. BRADLEY, JOHN B. CARRUTHERS, GERALD CLANCY, ISADORE COLES, RUTH COTTON, LUCIUS C. DANIEL, JR., CHARLES W. DAVID, RAYMOND C. DE RYCK, BRUCE GOLDSMITH, RICHARD A. HENTSCHEL, CALVIN C. HOPKINS, LLOYD JACKSON, RAYMOND KAY, JOHN J. KIRITSIS, EDWARD B. LEWAND, PHILIP MULLEN, STEVE RADULOVICH, ELMER RASKIN, CLAY REEVES, FRANCIS D. RYAN, GEORGE L. VAN ANTWERP, JR., BERNARD VESSELS, RICHARD VIECELLI, JULIUS WATSON, EDWARD WOJTOWICZ, CHARLIE CURRIE, ROBERT ESTON, THORNTON JACKSON, JAMES KINNARD, ALFONSO NEWKIRK, ROBERT PERRY, THEODIS POOLE, ROBERT RUHL, WILLIAM SHUFORD, RAYMOND SIKORA, ERNEST SOLOMON, AND JERAMIA WEATHERLY,

Petitioners,

v.

STATE OF MICHIGAN,

Respondent.

PETITIONERS' REPLY

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ARGUMENT

THE DISDAIN WITH WHICH RESPONDENT HAS TREATED THIS PETITION FOR WRIT OF CERTIORARI MAKES MANIFEST THE NEED FOR SUPREME COURT INTERVENTION IN THIS CASE.

As indicated in the Petition for Writ of Certiorari, Petitioners face a hostile state judiciary. Their arguments in the Michigan courts were treated in a perfunctory manner, wholly disregardful of the law, however basic and incontrovertible. That same approach has been taken here.

A. As Respondent acknowledges, the Michigan Court of Claims granted summary disposition against Petitioners on the basis of collateral estoppel. It is clear that this ruling was incorrect as a matter of law, since the District Court had no jurisdiction to rule on the merits, and the United States Court of Appeals never reached the merits of the property question, because of that lack of jurisdiction. The Court of Claims also purported to reach the merits of Petitioners' property interest claim, relying on the District Court opinion. That ruling by the Court of Claims, such as it was, was ignored by the Michigan Court of Appeals, which found only that Petitioners were collaterally estopped. As with the federal appeals court, the merits of Petitioners' claims were not reached. The posture of this case, therefore, is one in which Petitioners have had no appellate adjudication in the state courts of the merits of their claims, because of an egregious, wilfully erroneous application of the doctrine of collateral estoppel. All of this is fully amplified in the Petition for Writ of Certiorari. Yet Respondent would have this Court ignore the

fact that no appellate decision has ever been rendered on the merits of Petitioners' case. It relies on the ruling of the Michigan Court of Claims, delivered orally from the bench, in a summary disposition, interpreting the wrong statute and relying for its interpretation on a district court that was without jurisdiction, and that, in its turn, interpreted the wrong statute, to establish that "the merits of the state law issue were clearly resolved against Petitioner...."

The Respondent had conceded the misapplication of the doctrine of collateral estoppel under the governing federal law, but has characterized this as "not sufficiently important" to warrant the scrutiny of the U.S. Supreme Court. It may be that the destruction of 38 careers is of no significance to the government that guaranteed those careers; it is clearly significant to Petitioners, and the wilfulness of that misapplication alone should suffice to bring federal scrutiny. Moreover, the number of persons affected by the State's actions is not germane to an assessment of worthiness for review. If this, or any other state, can with impunity subvert federal procedural law for the purpose of depriving however many citizens of their constitutional rights, because the numbers immediately affected are small, are "not sufficiently important," of what value is the constitution? Numbers do not give rise to constitutional entitlements, or the right to their vindication. It is the majesty of our system that one person may call upon the courts for protection of constitutional rights against state usurpation.

The constitutional significance of the state's actions far transcends what has befallen Petitioners. The State of Michigan, through its courts, has, concededly, abused federal procedural law in order to prevent the adjudication of the even more extensive abuse of protections afforded Petitioners under the U.S. Constitution. It is this abuse, the misuse of

procedural law to deny a constitutional day in court, that gives added significance to the misapplication of federal procedural law, significance more than sufficient to warrant intervention by this Court.

B. Because the statutory language of MCL 600.8322 is so abundantly clear with respect to the granting of a property interest to Petitioners, the courts, and Respondent, have persisted in ignoring that section in favor of a reading of MCL 600.8321. This latter statute has been the straw man of the courts and Respondent; they have asserted that Petitioners rely on this section, and then declared that the section is inapposite. Petitioners do not rely on MCL 600.8321. **Petitioners rely on MCL 600.8322.**

On page seven of its brief, Respondent, for the first time, acknowledges that Petitioners rely on MCL 600.8322, or rather, on "one sentence" of that section. It might be asked, how many sentences in a statute are required in order to establish a property right? But, in fact, Petitioners rely on the entire section, including that portion of MCL 600.8322 which provides for life tenure for Petitioners.

After never "viewing" this section of the statute at all in the courts below, Respondent urges that it (or rather the one sentence it now deigns to acknowledge), not be viewed in "artificial isolation." It must be viewed in context. Of course it must. Respondent, however, while listing other statutes and court rules, utterly fails to provide the context into which MCL 600.8322 fits.

The statute upon which Petitioners rely, MCL 600.8322, is entitled:

> "Bailiffs, former common pleas court bailiffs, serving process, bond, term, vacancies, compensation, records, audit, appointment, retirement fund."

Its first sentence reads as follows:

> A person serving as a bailiff of the common pleas court of Detroit on August 31, 1981, pursuant to an appointment under section 23 of former Act 260 of the Public Acts of 1929, shall become a bailiff of the district court in the thirty-sixth district on September 1, 1981.

This statute was enacted in 1980, effective September 1, 1981. As amplified in the Petition for Writ of Certiorari, the statute provides for exclusivity of service of process and life tenure for the bailiffs of the 36th District Court. Petition for Writ of Certiorari A-33, 34, 35. (Such a reading is clear on the face of the statute, and is established beyond any doubt by the resolution of the Michigan House of Representatives appearing on A-29, 30 of the Petition for Writ of Certiorari.) The passage of this statute coincides with the demise of the Common Pleas Court of Detroit, and the creation of the 36th District Court. (MCL 600.8105 reads: "The district court in the thirty-sixth district shall not function for judicial purposes until September 1, 1981.") In short, the 36th District Court came into being in 1981, and the duties and tenure of the bailiffs of that court were provided for by the legislature at the same time, in MCL 600.8322.

Respondent, in its zeal to read MCL 600.8322 "in proper context" points to MCL 600.8321. It was this statute upon which the U.S. District Court and in reliance on that court's opinion, the Michigan Court of Claims, erroneously relied. That statute was enacted in 1969, at the time of the creation of the district court system in the state. But there was no 36th District Court at that time. That court did not come into being until 1981. It is clear, therefore, that MCL 600.8321 cannot have applied, when enacted, to a non-existent court. The same is true of Rule 103 of the District Court Rules of 1969. What the Respondent persists in ignoring is that in 1969, and indeed, until 1981, the Petitioners were

bailiffs of the Common Pleas Court of Detroit, wholly unaffected by MCL 600.8321 and District Court rules. The local rule of that court, under which they operated since 1940, provided, as does MCL 600.8322, for the exclusive service of process in the Common Pleas Court by bailiffs.

Again, the matter is quite simple, when honestly put. In 1980, effective in 1981, the legislature dissolved the Common Pleas Court and created a new district court in the City of Detroit, the 36th District Court. While so doing, the legislature chose to continue the life tenure in the exclusive service of process of the Common Pleas bailiffs, now to be bailiffs in the 36th District Court. The language of MCL 600.8322 is crystal clear on this point, as the legislature's resolution and the letter of the Chief Judge of the 36th District Court attest. Petition for Writ of Certiorari A-29, 30; A-31, 32.

As to the local court rule of the 36th District Court which applied prior to MCR 2.103, i.e., between 1981 and 1985, Respondent states that this rule permitted others to serve process. That rule provides, wholly consistent with and in conformity to MCL 600.8322, that all process shall be rotated among the bailiffs and court officers. (The court officers were contemplated as the replacements, through attrition, of the bailiffs. To this date, none has ever been appointed. See, MCL 600.8322.) Where a bailiff in the rotation is unable to undertake a given service, the rule provides for the chief judge to direct an exception to the assignment system, i.e., to provide for another bailiff to receive the assignment. Despite Respondent's assertion, nowhere did this court rule provide for service by other than a bailiff (or court officer), as the letter of Chief Judge Doss makes clear. Petition for Writ of Certiorari, A-31,32.

What, then, is the "proper context" for this sentence

that "cannot be viewed in artificial isolation?" First, it is not one sentence, but an entire statutory scheme relating to bailiffs in the 36th District Court, MCL 600.8322. Second, this statutory scheme was enacted 11 years after the enactment of MCL 600.8321 and the promulgation of Rule 103, on which Respondent relies. That is, the legislature clearly and consciously created a different system for the 36th District Court with respect to service of process from that applicable throughout the rest of the state's district court system. This creation resulted in the intentional grant of a property right; a life tenure position in the exclusive service of process in the 36th District Court. Respondent and the Michigan courts read legislation as if they had stepped through the looking-glass, and invite this Court to do the same. However, plain language and manifest legislative intent must prevail. Constitutional rights must be vindicated against state usurpation, or we will have indeed stepped through the looking glass and the Red Queen's law, not the United States Constitution will rule.

CONCLUSION

By virtue of the Eleventh Amendment, the claim by Petitioners of a violation of their property and contract rights under the United States Constitution can be heard only in the courts of the State of Michigan. Those courts have wilfully ignored Petitioners' rights, making a mockery of basic procedural and constitutional law. When the agency of government which has done the constitutional wrong is the supreme court of a state, and the state court system unites under it to thwart the claim of a constitutional wrongdoing set in motion by the supreme court of the state, only the U.S. Supreme Court can rectify that wrong. The law of federal procedure has been traduced in order to turn away Petitioners

and deprive them of a hearing on the merits of their claims. Petitioners' constitutional claims of deprivation of property without compensation and impairment of contract have been contemptuously ignored in order to deprive Petitioners of meaningful review.

The state legislature made clear its purpose with respect to Petitioners, both in the clarity of the language of the statute and Resolution adopted to reiterate the meaning of that statute. Nevertheless, the legislature has no power to compel the state courts to follow the commands of the U.S. Constitution. Only the U.S. Supreme Court can do this. It is imperative that this Court grant this Petition, to preserve the federal law of procedure, and to vindicate the rights of individuals that have been callously disdained. Perhaps most importantly, it must be made clear that this Court will not suffer constitutional lawlessness on the part of state courts when adjudication and vindication of constitutional rights are reposed by the Constitution, in the first instance, in those courts.

Respectfully submitted.

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